Supreme Court, U.S.
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No. 95-912

In the Supreme Court of the United States

October Term, 1995

LEONARD HIATT, et al., *Petitioners*

v.

UNION PACIFIC RAILROAD COMPANY, and
UNITED TRANSPORTATION UNION, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT UNION PACIFIC RAILROAD COMPANY'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation. The nonwholly owned subsidiaries of Respondent Union Pacific Railroad Company are:

Alameda Belt Line
Automated Monitoring & Control International, Inc.
Camas Prairie Railroad Company
Central California Traction Company
The Denver Union Terminal Railway Co.
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Co.
MT Properties, Inc.
Oakland Terminal Railway
The Ogden Union Railway & Depot Company
Peoria and Pekin Union Railroad Company
Portland Terminal Railroad Company
Portland Traction Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Transportation Data Xchange
TTX Company

Missouri Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation. The nonwholly owned subsidiaries of Missouri Pacific Railroad Company are:

The Alton & Southern Railway Co.
Arkansas & Memphis Railway Bridge and Terminal Co.
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
TTX Company
Wichita Union Terminal Railway Company

Union Pacific Resources Group Inc. is a nonwholly owned subsidiary of Union Pacific Corporation.

Respondent Union Pacific Railroad Company, together with Union Pacific Corporation and Missouri Pacific Railroad Company, filed a merger application with the Interstate Commerce Commission on November 30, 1995, for approval of its proposed merger with the Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company.

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STATEMENT OF JURISDICTION

Respondent Union Pacific Railroad Company submits that the lower courts lacked subject matter jurisdiction because section 3(g) of Public Law 102-29 (Pet. App. 548a) precludes judicial review of the subject matter of this case. Otherwise, Union Pacific does not object to Petitioners' Statement of Jurisdiction.

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RESPONDENT UNION PACIFIC RAILROAD COMPANY'S BRIEF IN OPPOSITION

Respondent Union Pacific Railroad Company ("Union Pacific") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Tenth Circuit.

STATEMENT OF FACTS

This case involves an Act of Congress (Public Law 102-29) that settled the 1991 nationwide railway strike involving most of the nation's railroads, including respondent Union Pacific Railroad ("Union Pacific"), and the majority of the unions representing their employees, including respondent United Transportation Union ("UTU"). One suit below was brought by Union Pacific brakemen who are members of the UTU. A companion case was also filed by different plaintiffs against respondent Burlington Northern Railroad and the UTU. This case involved a different collective bargaining agreement, but presented many of the same legal issues. The district court granted summary judgment in this age discrimination case in favor of all defendants, and the Court of Appeals for the Tenth Circuit affirmed.

Petitioners incorporate by reference the statement of facts in United Transp. Union v. United States, 987 F.2d 784 (D.C. Cir. 1993). However, that case does not provide an adequate statement of facts relevant to this case. The following additional facts are pertinent.

In 1990, the National Mediation Board advised the President of the United States that the ongoing negotiations between the major railroads and the railroad unions had broken down and threatened to disrupt interstate commerce. Pursuant to his statutory authority under the Railway Labor Act, see 45 U.S.C. § 160, the President appointed Presidential Emergency Board No. 219 ("PEB 219"). After hearings, PEB 219 made recommendations for a resolution of the various disputes between the railroads and the railroad unions. The unions refused to accept these recommendations and a nationwide rail strike ensued on April 17, 1991. That

same day, Congress intervened and enacted the recommendations of PEB 219 into law. This bill, now codified as Public Law 102-29, was signed by the President the next day, bringing the strike to an end. Section 2 of Public Law 102-29 required the President to appoint a Special Board which had power to modify or clarify the recommendations of PEB 219.

Historically, on Union Pacific Railroad, brakemen have been promoted to conductor. Those persons who were promoted to conductor retained their brakeman seniority dates, but also established a conductor's seniority date that was later than their brakeman's seniority date. Promotion to conductor was voluntary and some brakemen chose to forego promotion (or did not pass the required examination). The Plaintiffs are all such "unpromoted" brakemen.

One of the recommendations of PEB 219, which was codified by Public Law 102-29, was that promotion from brakeman to conductor be made mandatory, rather than voluntary. The UTU requested that the Special Board withdraw the requirement of mandatory promotion from brakeman to conductor, but the Special Board refused this request. After the Special Board issued its determinations, the National Carriers Conference Committee (which includes Union Pacific Railroad and Burlington Northern Railroad) and the UTU agreed to National Implementing Documents for Public Law 102-29. These Documents ratified the mandatory promotion requirement and provided that, "Except as modified hereby, existing rules and practices governing promotion continue in effect." See Appellants' 10th Cir. Appendix, A415 & A439; see generally Local 1389 v. United Transp. Union, 146 Lab. Rel. Rep. (BNA) 2998, 2999-3000 (E.D. Ky. 1992)(summarizing history of 1991 rail strike and

mandatory promotion issue).

Subsequently, Union Pacific Railroad and the UTU entered into the February 1, 1992 Crew Consist Agreement that was challenged in the underlying lawsuit. That agreement provided for a reduction in the number of brakeman positions and, as required by Public Law 102-29, for the mandatory promotion of brakemen to conductor. No other changes were made in the seniority system for conductors. Thus, mandatory promotion meant that those brakemen who had previously not been promoted to conductor would go to the bottom of the conductor's seniority roster, below brakemen who had taken promotion in earlier years. See Appellants' 10th Cir. Appendix, A132-A138. Because the reduction in the number of brakemen positions may have limited the opportunities for Plaintiffs to exercise their existing brakeman's seniority and because they would have to go to the bottom of the conductor's seniority roster, the Plaintiffs (unpromoted brakemen) felt negatively affected by the Crew Consist Agreement.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners' First Question: The Court of Appeals' Decision That Mere Knowledge of Disparate Impact Does Not Destroy the "Bona Fide Seniority System" Exemption Under the ADEA Does Not Conflict with the Decision of Any Other Court of Appeals and Applies Well Settled Law

Petitioners' first Question Presented is whether the "bona fide seniority system" exemption under the Age Discrimination in Employment Act, 29 U.S.C. §

623(f)(2)(A), is applicable where "the system was changed in a manner known to result in disproportional disadvantage [to] brakemen within the age protected group." The Question, as phrased, is factually incorrect. The only change to the existing seniority arrangements for conductors and brakemen was the mandatory promotion required by Congress in Public Law 102-29 -- which Plaintiffs did not (and could not) challenge. See Pet. App. 5a-7a. As the Court of Appeals noted, "The Plaintiffs ... admit that they were treated no differently under the seniority system than other newly promoted conductors." (Pet. App. 10a). Thus, as Petitioners themselves concede, the legal issue actually presented is whether "the parties were obligated to negotiate a new or different seniority system to avoid discriminating against the older brakemen." Petition for Writ of Certiorari, p. 17 (emphasis added).

In other words, the question presented is whether an employer and union are required to change an otherwise bona fide seniority system simply because they have knowledge that the unchanged system, as applied, will produce a disparate impact on older employees. The precedents of this Court unequivocally hold that no such changes are required. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court interpreted the identically worded "bona fide seniority system" exemption under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court held that "the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." Id. at 65; accord, Pullman Standard v. Swint, 456 U.S. 273, 277 (1982); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 352-55 (1977).

As the Court of Appeals noted in its opinion (Pet. App. 9a), Petitioners essentially conceded that the preexisting conductor seniority system -- under which a seniority date was established when a person entered the craft -- was bona fide, and they offered no evidence that intentional age discrimination played any role in the establishment or maintenance of this longstanding seniority arrangement. In fact, Petitioners did not claim to have any knowledge concerning any negotiations between Union Pacific and the UTU. Unless there is evidence of intentional discrimination, the "bona fide seniority system" exemption is applicable. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977)("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences").

The legal theory under which Petitioners proceeded -- that the Respondents were under an obligation to change the conductor seniority system solely because it allegedly had a disparate impact -- is squarely inconsistent with the precedents of this Court. The Court of Appeals correctly held that the "bona fide seniority system" exemption in the Age Discrimination in Employment Act precluded Plaintiffs from pursuing a "disparate impact" challenge. Moreover, Petitioners do not point to any precedent allowing such a disparate impact challenge to a bona fide seniority system. Because of the absence of any important question of federal law and of any conflict among the courts of appeals, Petitioners' first Question Presented is not appropriate for review by certiorari. See Sup. Ct. R. 10.

2. Petitioners' Second Question

Petitioners' second Question Presented asserts that the

district court procedurally erred by granting summary judgment before discovery was complete.

a. The District Court Did Not "Convert" Union Pacific's Motion to Dismiss Into a Summary Judgment Motion "Without Notice"

Petitioners' second Question Presented asserts that the district court "converted" Union Pacific's motion to dismiss into one for summary judgment "without notice." This formulation of the Question Presented is factually incorrect, since Petitioners were well aware that Union Pacific sought summary judgment in the district court. In fact, Union Pacific's motion was expressly stated to be one for "summary judgment" and the parties extensively briefed and argued whether summary judgment was appropriate. See, e.g., Pet. App. 92a, 99a, 115a. Plaintiffs' counsel recognized that the proceedings had "been converted into a Rule 56 kind of situation" [Pet. App. 469a], and discussed the factual issues that he believed precluded summary judgment for defendants [Pet. App. 441a-48a].

b. The Procedures Followed by the Lower Courts in This Case Were Proper Under Fed. R. Civ. P. 56(f) and Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

The district court granted summary judgment before discovery was complete. There is no requirement that summary judgment be withheld until discovery is complete. Rule 56(f) makes it possible for a party to postpone summary judgment pending further discovery, but "only if the

nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion." See Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1376 (10th Cir. 1988); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992)(unverified statement of counsel will not satisfy Rule 56(f)); Weir v. Anaconda Co., 773 F.2d 1073, 1081-82 (10th Cir. 1985).

Here, Plaintiffs chose not to submit the affidavits required by Rule 56(f); as they state in their Petition (p. 7), "no Rule 56(f) affidavit was deemed warranted." Thus, under well established Tenth Circuit precedent, the district court acted within its discretion by granting summary judgment without further discovery:

> Where a party opposing summary judgment and seeking a continuance pending completion of discovery fails to take advantage of the shelter provided by Rule 56(f) by filing an affidavit, there is no abuse of discretion in granting summary judgment if it is otherwise appropriate.

Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986). See Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984)(district court's discretion in denying discovery in absence of satisfactory Rule 56(f) affidavit "will rarely be disturbed"); Dreiling, supra, 850 F.2d at 1376-77.

Even if Plaintiffs had filed a Rule 56(f) affidavit, they could not have avoided summary judgment. A Rule 56(f) affidavit must show how discovery "would enable [plaintiff] to meet its burden in opposing summary judgment," and a "mere assertion that discovery is incomplete" is not sufficient. See Pasternak, supra, 790 F.2d at 833; see Universal Money

Centers, Inc. v. AT&T, 22 F.3d 1527, 1536 (10th Cir.), cert. denied, 115 S. Ct. 655 (1994). None of the repetitious affidavits submitted by the Plaintiffs (see Pet. App. 127a-403a) says that the affiant has any personal knowledge about the negotiations of the Crew Consist Agreement. Instead, these affidavits merely assert that the negotiators must have been aware of the alleged "disparate impact" of the mandatory promotion required by Public Law 102-29.

Even if these allegations were accepted, they would be legally insufficient, and would not require further discovery. Where a case is dismissed on legal grounds, "further factual development [is] unnecessary" and there is no abuse of discretion in denying further discovery. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1393 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991); see Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984). Where a plaintiff has "no evidence whatsoever" of improper motivation by the defendant, but "merely suspects that he could find such evidence if given a chance, he is not entitled to pursue such a fishing expedition in federal court." Jarvis v. Nobel/Sysco Food Service Co., 985 F.2d 1419, 1422-23 n. 4 (10th Cir. 1993).

On the facts of this case, where Plaintiffs chose not to submit the affidavit required by Rule 56(f), the grant of summary judgment prior to the completion of discovery was fully justified by Tenth Circuit precedent. Moreover, Petitioners have not identified any precedent from another court of appeals that is inconsistent with Tenth Circuit precedent under Rule 56(f), and, in fact, there is no such inconsistency. See Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)("failure to file Rule 56(f) affidavit is itself sufficient grounds to reject a claim that the

opportunity for discovery was inadequate"); King v. Cooke, 26 F.3d 720, 726 (7th Cir. 1994), cert. denied, 115 S. Ct. 1373 (1995)("when a party does not avail himself of relief under Rule 56(f), it is generally not an abuse of discretion for the district court to rule on the motion for summary judgment"); Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991)(denial of Rule 56(f) application proper where it is clear that evidence sought "is the object of pure speculation"); Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1443 (5th Cir. 1993)(plaintiff not entitled to Rule 56(f) continuance where he failed to specify materials he hoped to obtain with further discovery and exactly how those would create a genuine issue of material fact); Paterson-Leitch Co., Inc. v. Mass. Municipal Wholesale Electric Co., 840 F.2d 985, 989 (1st Cir. 1988)(Rule 56(f) discovery not justified where plaintiff failed to set forth basis for believing that some discoverable material facts existed and to show how the facts sought, if obtained, would help defeat summary judgment motions); Humphreys v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1081 (8th Cir. 1993)(plaintiffs not entitled to further discovery before summary judgment where plaintiffs failed to file affidavit specifying what further discovery might unveil and its relevance to issues pleaded). Therefore, since there is no conflict among the circuits and because the Court of Appeals did not depart from "the accepted and usual course of judicial proceedings," Petitioners' second Question Presented is not appropriate for review on writ of certiorari. See Sup. Ct. R. 10.

3. Petitioners' Third Question

a. Petitioners Offered No Evidence of Intentional Discrimination and Such Factual Issues Are Not Appropriate for Review by Writ of Certiorari

Petitioners' third Question Presented asserts that the district court and court of appeals erred by holding that the Plaintiffs had failed to establish that the "Defendants' reasons for its [sic] actions were pretextual in their disparate treatment claim." The district court held that Plaintiffs failed to identify evidence that Union Pacific and the UTU's adoption of the Crew Consist Agreement, which implemented the Congressional requirement of mandatory promotion to conductor, was a "pretext for intentional and unlawful discrimination on the basis of age." Pet. App. 40a-41a. The Court of Appeals conducted an "independent review of the record" on this point, and concluded that the most that the Petitioners had shown was that "they were inconvenienced by the obligatory promotion to conductor." Pet. App. 11a.

In this Court, Petitioners urge (p. 10) that these factual holdings should be reviewed de novo. This is incorrect. Rule 10 of the Supreme Court Rules states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)("a court of law, such as this Court is, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error").

In any event, there was no evidence of intentional age

discrimination in the negotiation of the Crew Consist Agreement challenged by the Petitioners. Petitioners argue that the numerous repetitive affidavits that they submitted in the district court are a sufficient basis from which discriminatory intent could be inferred. Petitioners point to the assertions in these affidavits that Union Pacific and the UTU "refused to consider" the fact that mandatory promotion would (allegedly) result in older employees with less conductor seniority doing less desirable work than younger employees with more conductor seniority. Petitioners urge that it would have been "impossible" for Union Pacific and the UTU "not to have known" of this "disparate impact," and assert that such knowledge is "evidence of disparate treatment." Petition, p. 13.

Mere knowledge of disparate impact is not a sufficient basis from which to infer intent to discriminate:

> "Discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979)(citations omitted).

This general principle is particularly applicable in the context of seniority arrangements. Virtually every seniority system will have some sort of statistical impact on some grouping of employees, whether based on age, race, sex, or ethnic origin. If knowledge of such potential adverse impacts constituted intentional discrimination, the collective

bargaining process would be effectively deadlocked. As the Court of Appeals for the Seventh Circuit has reasoned,

> Bargaining has winners and losers.... Unless its leaders are unfathomably dense, the union knows who wins and who loses. The losers always may say that the union "intended" them to lose. As all of society is an assembly of minorities, the losers can point to some respect (age, sex, religion, politics, skill, health, membership in the union, status during the most recent strike) in which they are in a minority, and insist that the distinction must have been part of a "bad faith" plot to "penalize" them on account of that status. Taken to its limits, the approach prevents the union from resolving differences internally and representing the interests of workers as a group. Yet one of the premises of the Railway Labor Act (like the National Labor Relations Act) and a requirement of the Labor-Management Reporting and Disclosure Act, is that unions act democratically to reach a collective decision -- the majority is entitled to prevail.

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1529-31 (7th Cir. 1992), cert. denied, 114 S. Ct. 286 (1993).

b. The Courts of Appeals Agree That the ADEA Does Not Impose Any Duty of "Accommodation"

Petitioners have not identified evidence that Respondents had any affirmative intention to discriminate

against older employees. Instead, they complain about inaction by the railroads and the union -- that is, their failure to take steps to treat Petitioners more favorably than other workers. They assert that the railroad and union defendants were required to adopt new seniority arrangements, such as "dovetailing" seniority, that would prevent workers in a job category where the workers are allegedly older (on average) from being disadvantaged.[1] Their theory (Petition, p. 15) is that the Age Discrimination in Employment Act imposes an affirmative obligation to ensure that older workers are not disadvantaged by changes in workplace rules (in this case, a change mandated by Congress). There is no such requirement under the ADEA.

The courts of appeals are in agreement that, as the Tenth Circuit held in this case, there is no requirement in the ADEA of accommodation or preferential treatment for older workers. See Bovers v. Flying Tiger Line, Inc., 979 F.2d 291, 298 (2d Cir. 1992)(ADEA "does not entitle [older

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[1] Plaintiffs have consistently asserted their theory that the ADEA mandates affirmative acts to avoid harm to older workers. For example, their brief in opposition to summary judgment charged that "there was no attempt by these defendants to preserve these employees' years of service's earned job conditions" and that defendants failed to take steps "designed to ensure that the age protected employees would not be discriminated against." Pet. App. 100a. Similarly, the affidavits submitted in opposition to summary judgment stressed the respondents' inaction. See, e.g., Affidavit of Leonard Hiatt, Pet. App. 129a (Union Pacific and the UTU "decided to stick their heads in the sand and disregard all the years of service that myself, other plaintiffs, and other older workers had"). Forty-six affidavits contained an identical assertion of inaction: "There was no attempt by the UPRC or the UTU to preserve my years of service as a Brakeman when the Current Crew Consist Agreement was implemented...." Pet. App. 136a-37a & 140a-319a.

persons] to protection against all negative employment decisions, when these are made for reasons independent of their age"); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 960 (8th Cir. 1978)(ADEA "does not require that advanced age and substantial length of service entitle employees to special favorable consideration"); Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982) (ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group"; rather, age "is accorded neutral status ... neither facilitating nor hindering" employment); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1985)(same); Fink v. Western Electric Co., 708 F.2d 909, 915 (4th Cir. 1983)(same)(dictum); Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)("ADEA does not require employers to accord members of the protected class preferential treatment, but only that they treat age neutrally"). Because there is no conflict among the circuits and no unsettled question of federal law, the issue is not appropriate for review by writ of certiorari. See Sup. Ct. R. 10.

4. Petitioners' Fourth Question: The Court of Appeals Did Not Decide Whether the "Adverse Impact" Doctrine Applies to Age Discrimination Cases

Petitioners' fourth Question Presented addresses whether the "district court, in a decision affirmed by the appellate court," erred in holding that the disparate impact doctrine is inapplicable to cases arising under the Age Discrimination in Employment Act. In fact, the Court of Appeals for the Tenth Circuit did not affirm the district court on this issue. Instead, it held that the issue of the disparate

impact issue under Title VII need not be resolved because the seniority system was exempt from the ADEA under the "bona fide seniority system" exemption. Pet. App. 8a.

Petitioners have sought a writ of certiorari directed to the Court of Appeals for the Tenth Circuit, not the district court. The court of appeals did not resolve the issue addressed in Petitioners' fourth Question. Therefore, there is no conflict between the Tenth Circuit and other courts of appeals with respect to the adverse impact theory under the ADEA, and certiorari is not appropriate with respect to that question. See Sup. Ct. R. 10. Instead, if this Court granted certiorari and reversed on issues actually resolved by the appellate court, only then might it be appropriate for the ADEA disparate impact issue to be remanded to the court of appeals for consideration as an initial matter. See, e.g., FTC v. Travelers Health Ass'n, 362 U.S. 293, 298 n. 4 (1960); FCC v. WJR, Inc., 337 U.S. 265, 285 (1949).

5. The Lower Courts Had No Subject Matter Jurisdiction Over This Case

Section 3(g) of Public Law 102-29 (Pet. App. 548a) provides, "There shall be no judicial review of any report or determination of the Special Board under this section." One of the determinations of the Special Board was that promotion from brakeman to conductor should be mandatory. See Pet. App. 553a (report of PEB 219); App. 10th Cir. App. A52-53, A112, A125-28 (Special Board's refusal to modify report of PEB 219). The court of appeals held that Public Law 102-29 did not deprive the lower courts of jurisdiction because the Petitioners did not challenge the mandatory promotion required by the Special Board, "but the manner in which the Defendants carried out their statutory duties." Pet.

App. 7a.

Respondent Union Pacific respectfully submits that the court of appeals erred in finding that subject matter jurisdiction existed. Congress (via the Special Board) required the mandatory promotion of brakemen to conductor. As the court of appeals recognized, "the alleged harm was caused solely by the interaction of the congressional mandate and the established seniority system." Pet. App. 11a. Since there was no change in the existing seniority system except for the change required by Congress, section 3(g) of Public Law 102-29 deprived the lower courts of jurisdiction to review the consequences of the change required by Congress.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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